Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	

REPLY COMMENTS OF THE NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association (NTCA)[1] respectfully submits its reply comments in the above-captioned proceeding.

I. THE COMMISSION SHOULD NOT PROCEED WITH THE NPRM UNTIL AFTER IT FULLY IMPLEMENTS ACCESS REFORM FOR RURAL LOCAL EXCHANGE COMPANIES (THE MAG ORDER).

In its initial comments, NTCA urged the Commission to postpone the Notice of Proposed Rulemaking (NPRM) until after it completes its ongoing review of the five-year rural carrier access reform plan in the Multi-Association Group (MAG) proceeding[2] and fully implements its new rural access charge rules.[3] On October 11, 2001, the FCC adopted an order and further notice of proposed rulemaking (FNPRM) in the MAG proceeding. The text of the order, however, has not yet been released. It is NTCA's opinion that until all of the FCC's new rural carrier interstate access rules and rates are fully implemented and carefully assessed over a reasonable period of time, neither the Commission nor interested parties can properly evaluate and weigh the effects of future bill and keep proposals that may take effect after the new rates and rules have expired.

[1] NTCA is a non-profit corporation established in 1954. The association represents 550 rural incumbent local exchange carriers (ILECs). Its members are full service telecommunications companies providing local, wireless, cable, Internet, satellite and long distance services to their communities. Rural ILECs provide telecommunications services to 40 percent of the geographic area of the United States and are dedicated to ensuring the economic future of rural America.

[2] Multi-Association Group (MAG) Plan, CC Docket Nos. 96-45, 00-256, FCC 01-157 (rel. May 23, 2001).

A significant portion of the Industry agrees. The National Rural Telecom Association (NRTA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) assert that until "the MAG plan (or a similar five year plan) has been put into place, neither the Commission nor any other interested party can reasonably analyze – let alone endorse or adopt – a long-term, post-transition plan of any kind.[4] The National Exchange Carrier Association (NECA) also argues that the replacement of current access charge mechanisms is premature and that the FCC should observe the MAG order's resulting market conditions before considering any additional interstate access reform measures.[5]

Price cap LECs, such as Verizon, recommend that the new MAG rules should be given a chance to run their course before any fundamental change in the intercarrier compensation system.[6] Sprint too recommends that the FCC defer implementation of a new intercarrier compensation regime at least until the CALLS order is fully implemented, and preferably after an access reform plan is implemented for RoR LECs.[7]

In addition, consultants recommend that before the FCC embarks on the creation of a new unified regime for intercarrier compensation, it should finish uncompleted reform on the existing regime.[8] The final "resolution of modifications to the existing regime would provide a foundation for which rural LECs could reasonably comment

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[3] NTCA Initial Comments at 1-2.

[4] NRTA and OPASTCO Initial Comments at 3-4. Also see, Western Alliance Initial Comments at iii.

[5] NECA Initial Comments at 17-18.

[6] Verizon Initial Comments at 18. Also see, SBC Initial Comments, (the implicit subsidy problem should proceed before any implementation of a bill and keep structure that results in the elimination of access charges); ALLTEL Initial Comments at 10 (without the MAG plan adopted, rate of return ILECs would not have adequate notice to avoid economic displacement and rate shock to customers).

[7] *Id.,* also see CenturyTel Initial Comments at 12-13. (Unless the Commission modernizes its regulation of non-price cap ILECs, bill and keep could have disastrous consequences.)

[8] TCA Initial Comments at 2.

regarding future regimes."[9] And "the performance of both the CALLS and the MAG plan should be carefully assessed over a period of several years' actual data" so that the effectiveness of these plans will "dictate the requirements needed by any comprehensive intercarrier compensation plan."[10]

The commenters that support, or partially support, adopting a bill and keep regime include wireless carriers, their associations[11] and a small number of other carriers.[12] Almost all of these commenters, however, fail to address or recognize the fact that the existing access regime for rural ILECs is in flux and will change while this NPRM is underway. The two commenters that did acknowledge the issue, Sprint and SBC, recommend that the FCC resolve access restructuring before considering bill and keep proposals for interstate access charges.

Rural ILECs and rural consumers require the same level of regulatory certainty and predictability concerning their interstate access rates as non-rural LECs and their customers. Without it, neither the Commission nor carriers can possibly determine the potential effects of future bill and keep proposals on rural carriers and their customers. NTCA therefore urges the Commission to: (1) fully implement its new rural access rules and rates, (2) allow enough time to observe and evaluate the ensuing effects of the implementation of the new rules on rural consumers, carriers and markets, and (3) then

[9] TCA Initial Comments at. 3.
[10] Parrish, Blessing & Associates, Inc. Initial Comments at 20.
[11] See the Initial Comments of AT&T Wireless, Cable Wireless USA, Cellular Telecommunications and Internet Association (CTIA), Mid-Missouri Cellular, Nextel, PCIA, Rural Telecom Group, Verizon Wireless, and VoiceStream Wireless.
[12] See the Initial Comments of BellSouth, CBEYOND, GSA, Qwest, SBC, and Sprint.

reevaluate whether further consideration of a new intercarrier compensation regime is necessary and in the best interest of rural America.[13]

II. THE COMMISSION LACKS STATUTORY AUTHORITY TO MANDATE BILL AND KEEP FOR ALL LOCAL TRAFFIC SUBJECT TO SECTION 252(b)(5).

Sections 252(d)(2) of the Telecommunications Act of 1996 (Act) explicitly provides the state commissions, not the FCC, with the authority to set rates for the transport and termination of local calling traffic subject to section 251(b)(5), including ILEC-CMRS traffic.[14] Bill and keep is only one option, among several, that state commissions may consider when determining whether an agreement for the mutual and reciprocal recovery of costs associated with the transport and termination of local calls is appropriate. The Commission therefore lacks the statutory authority to mandate bill and keep for all local traffic subject to section 251(b)(5).[15]

Moreover, mandatory bill and keep may also violate the "just and reasonable" standard in section 210(b) when interstate traffic between carriers is unbalanced.[16]

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[13] Some also argue that because of the very different characteristics of small ILECs compared to price cap ILECs, and the very different impacts of bill and keep on their respective local rates, the FCC should exclude small ILECs from any current investigation of the feasibility of a unified bill and keep regime. See Minnesota Independent Coalition Initial Comments.

[14] NTCA Initial Comments at pp. 2-3 (Section 252(b)(5) provides carriers with the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic. Section 252(d)(2)(A)(i) provides the state commissions with authority to determine the just and reasonableness of reciprocal compensation arrangements for the recovery of costs associated with the transport and termination of calls that originate on the network facilities of another carrier. And section 252(d)(2)(B)(i) further provides that these compensation arrangements may include arrangements that waive mutual recovery of costs, including bill and keep arrangements).

[15] RICA Initial Comments at 10. Also see CompTel Initial Comments at 23 (Mandatory bill-and-keep regimes do not meet the compensation requirement of Section 251(b)(5) or the reasonable approximation of additional costs requirement of section 252(d)(2) because they result in a reciprocal compensation rate of zero for surplus traffic where traffic flows between carriers are not roughly equal.)

[16] WorldCom Initial Comments at 3 (the Act bars the FCC from imposing a bill and keep regime for the exchange of local traffic in circumstances where the traffic exchanged is not relatively balanced in each direction).

The United States Court of Appeals for the District of Columbia Circuit held that a "basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost."[17] Although section 201(b) does not require the FCC to establish purely cost-based rates, it must specifically justify any differential that does not reflect cost.[18] A mandatory bill and keep proposal that fails to justify the differences in rates that do not reflect cost therefore could violate the just and reasonable standard in section 201(b) of the Act.[19]

III. THE FCC SHOULD REFER THE NPRM TO THE FEDERAL-STATE JOINT BOARDS ON UNIVERSAL SERVICE AND SEPARATIONS.

In initial comments, NTCA and several others argued that the intercarrier compensation proposals in the NPRM, if adopted, would have a tremendous effect on universal service and separations and therefore should be presented to the Federal-State Joint Boards on Universal Service and Separations for a their recommendations prior to the adoption of any new proposals.[20] The Commission's bill and keep proposals would require significant reallocations of federal universal service support to ensure comparable urban and rural rates and dramatic changes in the existing jurisdictional separations rules to ensure state commissions can adequately determine the revenues and expenses properly attributable to intrastate service.[21] These complicated multi-jurisdictional issues

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[17] CompTel Initial Comments at 24, citing *ALLTel Corp. v. FCC,* 838 F.2d 551, 557 (D.C. Cir. 1988) and *CompTel v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996).

[18] *CompTel v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996).

[19] NECA Initial Comments at 48, citing, *AT&T v. Iowa Utilities Board,* 525 U.S. 366 (1999)(The Supreme Court has also found that the 1996 amendments to the Communications Act of 1934 did not intend to shift the balance of state and federal jurisdiction regarding toll access).

[20] See Initial Comments of Maryland Office of People's Counsel, Public Service Commission of Wisconsin, National Rural Telecom Association (NRTA) and Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), Office of Public Utility Counsel of Texas, Independent Telephone & Telecommunications Alliance, Florida Public Service Commission, and Regulatory Commission of Alaska.

[21] Regulatory Commission of Alaska Initial Comments at 4.

dictate that the Joint Boards be given an opportunity to evaluate the proposals and make their recommendations prior to the FCC issuing its decision in this proceeding.

Interstate access costs that are currently averaged nationwide by IXCs in their rates would be recovered directly from high-cost rural end-users under a bill and keep regime.[22] This shifting of costs appears contrary to the cost-sharing concept under section 254(g) and the requirement that there be reasonable comparability between rural and urban rates and services under section 254(b)(3).[23] Referring the NPRM to the Joint Board on Universal Service for its recommendation on these issues will greatly assist the Commission in ensuring that it has thoroughly considered the Act's universal service policies and principles before the adoption of a new intercarrier compensation mechanism.

The cost shifting required under bill and keep proposals would also disturb the existing jurisdictional cost allocations and separations under Part 36 of the Commission's rules. Without referring the NPRM to the Joint Board on Separations in accordance with Section 410(c), the FCC runs the serious risk of improperly preempting "state commission jurisdiction to estimate the value of property used in the provision of intrastate service and determine the revenues and expenses properly attributable thereto."[24] The Regulatory Commission of Alaska estimates that bill and keep could lead to increases of up to $100 per month per line.[25] Referring the NPRM to the Joint Board on Separations will also assist the Commission in avoiding the improper preemption of state commission jurisdiction and potential litigation.

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[22] NRTA and OPASTCO Initial Comments at 16.
[23] 47 USC §§ 254(b)(1), 254(b)(3).
[24] *Smith v. Illinois Bell Telephone Co.,* 282 U.S. 133, 51 S.Ct. 65 (1930).

IV. THE COMMISSION SHOULD ELIMINATE THE ESP EXEMPTION.

Several commenters request that the Commission make the future of the enhanced service provider (ESP) exemption a central focus in this proceeding.[26] NTCA joins in this request. Today, ESPs provide Internet voice telephony, email, and chat room services that are exempt from paying access charges. These services are clearly direct substitutes for services provided by telecommunications providers that pay access charges. The revenue from Internet telephony alone is projected to grow from $1 billion in 2000 to more than $60 billion in 2005.[27] The continuation of the ESP exemption will only further facilitate regulatory arbitrage and uneconomic incentives for Internet telephony.[28] The Commission should therefore eliminate or phase out this regulatory arbitrage as part of access and universal service reform. It is time for ESPs to pay their fair share of the substantial and increasing ILEC costs associated with carrying their access traffic.

V. THE ECONOMIC THEORIES UNDERLYING COBAK AND BASICS ARE FLAWED AND WOULD CREATE NEW REGULATORY ARBITRAGE PROBLEMS IF ADOPTED.

In its initial comments, NTCA argued that some of the economic assumptions underlying the COBAK and BASICS proposals as put forward in the NPRM are either dubious or false, specifically the assumption that both the calling and called parties benefit from a completed call, and thus should share in its cost.[29] Several of the

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[25] Regulatory Commission of Alaska Initial Comments at 4.
[26] RICA Initial Comments at 6.
[27] USTA Initial Comments at 9.
[28] Western Alliance Initial Comments at 5.
[29] NTCA Initial Comments at 16.

commenting parties concurred.[30] Several types of calls—such as those from telemarketers, for example—provide the called party with no benefit. Under the COBAK or BASICS regimes, however, the called party would incur a cost for the call. Allegiance Telecom offered an interesting analogy, likening forcing a consumer to pay for a call that he or she does not wish to receive in the first place to the postal service requiring citizens to pay postage on junk mail they receive.[31]

NTCA also stated in its comments that while both COBAK and BASICS are predicated on the concept of efficiency, efficiency is difficult to define, and should encompass qualitative as well as quantitative factors.[32] As codified in the Telecommunications Act of 1996, other factors, such as ubiquity, and comparably and reasonably priced service are goals of telecommunications service in rural areas[33]. Several commenters questioned COBAK and BASICS predication upon the nebulous concept of "efficiency."[34] In fact, many pointed out that relying upon efficiency as the sole determinant of telecommunications policy could impart dramatic harm on certain consumers. As TCA noted, "efficiency should not be the *primary* goal of an intercarrier compensation system. If efficient deployment of network services were the sole goal of

[30] *See*, for example, Initial Comments of Ad Hoc Telecommunications Users Committee at 5-6, Allegiance Telecom at 3, Maryland Office of People's Counsel at 25-26, Michigan Exchange Carriers Association at 8-9, Missouri Small Telephone Company Group at 9-10, National Association of State Utility Consumer Advocates at 21, Oklahoma Rural Telephone Company at 35-36, and Time Warner Telecom at 5-7.

[31] Allegiance Telecom Initial Comment at 3.

[32] NTCA Initial Comments at 18.

[33] 47 U.S.C. §254.

[34] *See*, for example, Initial Comments of Michigan Exchange Carriers Association at 2-6, Missouri Small Telephone Company Group at 6-8, Oklahoma Rural Telephone Coalition at 43-45, TCA at 4, and Office of Public Utility Counsel of Texas at 17-20.

telecommunications policymakers, customers in many high cost rural areas would simply not be provided any service."[35] (emphasis retained.)

NTCA argued that the implementation of COBAK or BASICS would result in perverse incentives based upon incorrect economic signals.[36] Several commenters concurred.[37] The Maryland Office of the People's Counsel, for example, correctly points out that under the bill and keep proposals "it would be to the [inter-exchange carrier's] advantage to minimize its costs, even if that increased the costs to the LECs."[38] Such a result could hardly be characterized as "efficient." Further, the Oklahoma Rural Telephone Coalition notes that under COBAK or BASICS "[service providers] will receive incorrect economic cost signals to enter the respective market as a service provider for toll, CMRS and local service because they do not have to face or deal with all of the costs they incur for providing the service."[39] In the absence of correct economic signals, inefficiencies and injustice are the all but inevitable results.

Several commenters also note that the imposition of COBAK or BASICS could likely result in the creation of new regulatory arbitrage problems.[40] As the Office of Public Utility Counsel of Texas notes, "potential for arbitrage always looms large when regulators approve tariff provisions that are not cost based."[41] The Maryland Office of the Peoples Counsel notes that both the COBAK and BASICS proposals "discriminate in

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[35] TCA Initial Comments at 4.

[36] NTCA Initial Comments at 18.

[37] *See*, for example, Initial Comments of Ad Hoc Telecommunications Users Committee at 10, America Online, Inc. at 7-9, CompTel at 9-10, Maryland Office of the People's Counsel at 11, National Association of Regulated Utility Commissioners at 5-6, and Oklahoma Rural Telephone Coalition at 36.

[38] Maryland Office of the People's Counsel Initial Comments at 11.

[39] Oklahoma Rural Telephone Coalition Initial Comments at 36.

[40] *See*, for example, Initial Comments of Global Naps, Inc. at 7-14, Maryland Office of the People's Counsel at 2-6, Office of Public Utility Counsel of Texas at 37-43 and Time Warner Telecom at 19-22.

[41] Office of Public Utility Counsel of Texas Initial Comments at 37.

charging based on the classification of the customer" and that such discrimination "creates arbitrage."[42] While one of the stated goals of both COBAK and BASICS was to eliminate such opportunities for "gaming the system," merely replacing current arbitrage opportunities with others will serve no useful purpose whatsoever.

VI. CONCLUSION

Based on the above reasons, the Commission should postpone further consideration of the NPRM until it has fully implemented its new access rules for rural carriers and the Joint Boards on Universal Service and Separations have issued their recommendations concerning the NPRM.

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[42] Maryland Office of the People's Counsel at 2.

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Reply Comments of the National Telephone Cooperative Association in CC Docket No. 01-92, FCC 01-132, was served on this 5th day of November 2001 by first-class, U.S. Mail, postage prepaid, to the following persons

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